No. 16,041

United States Court of Appeals

For the Ninth Circuit

CHARLES E. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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In this reply brief appellant will comment on appellee's argument in the order of its subdivisions.

I.

Commencing on page 6 of its brief appellee reasons that it was not error to admit the testimony of Officer Dankworth concerning admissions made by appellant on March 27, 1957 because the trial Court erred in excluding the confession.

On pages 6, 7 and 8 appellee argues that the doctrine of *McNabb v. United States,* 318 U.S. 332, *U. S.*

v. Carignan, 342 U.S. 36, and *Mallory v. United States,* 354 U.S. 449, do not apply and commencing near the top of page 7 appellee states as follows:

> "In the case at bar, the appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney (R. 148, 150). The appellant was arrested pursuant to a warrant signed by the United States Commissioner (R. 294). The appellant apparently received legal advice before signing his statement (R. 159, 160, 204). The appellant was arraigned in Seattle during normal business hours and again advised of his rights and had assistance of counsel (R. 173, 299, 300, 301). The record is devoid of any coercion or prolonged questioning or third degree methods. The McNabb case could not be applied to the facts here under any logical stretch of one's imagination."

Analyzing the above in the order that the sentences occur and referring to the transcript citations, it is found that the testimony substantiating the fact that appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney appears in the cross-examination of Special Agent Harkabus of the Board of Fire Underwriters by counsel for appellant. Harkabus stated that he was not interested in the crime for which appellant was arrested. Officers Pass and Trafton who were responsible for appellant's arrest and who conducted the initial examination on the day of the arrest were not available for the trial. Territorial Police Officer Trafton was on vacation in Japan. Detective Pass had been fired by the Anchorage Police Department and

was confined to a hospital in South Carolina. We have only Special Agent Harkabus' testimony on this point to contradict that of appellant to the effect that he was not advised that he need not make a statement or that he was entitled to the services of an attorney. The Court's attention is invited to Harkabus' statement on page 148 of the transcript (made out of response to a question posed by appellant's counsel in order to get it in the record) that Detective Pass had actually informed appellant that he need not make a statement and that he was entitled to the services of counsel. It is obvious from Harkabus' answer that he was attempting to supply vital information which the arresting and interrogating officers were not going to supply.

Appellee, based on the transcript citations mentioned, *assumes* that "appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney". The thing that was not "promptly" done immediately after appellant's arrest was to take him before an officer for arraignment as required. The record shows that appellant was arrested around 3:00 o'clock P.M. and immediately taken to the King County Jail in Seattle, where his interrogation commenced immediately.

Appellee contends that appellant was arrested pursuant to a warrant. A warrant apparently did issue in Anchorage on March 14th. There is no direct evidence and it seems unlikely that the warrant was received in Seattle in time to arrest appellant in Renton, Washington at 3:00 o'clock P.M. the following day.

Neither Pass nor Trafton were present to testify that they had such a warrant. The Court's attention is invited to the evasive testimony of Special Agent Harkabus to the effect that he thought he saw a warrant. (Tr. 139-140, 146.) Appellee *assumes* that appellant "apparently received legal advice before signing his statement" and gives transcript citations to support such a conclusion. A study of the transcript's citations given will show conclusively that appellant's attorney was barred from the interrogation room during the time appellant was being grilled for the third successive day in connection with the charge. A study of appellee's transcript citations and the pages immediately preceding and following the citations will show conclusively that appellant was prevented from consulting with his attorney in a manner disgraceful to law enforcement procedure.

Appellee again assumes that appellant was arraigned in Seattle during *normal business hours.* There is nothing in the record to show that Friday afternoon of March 15, 1957 was not a normal business day. After appellant's arrest he could have been immediately taken before an arraigning officer. This was not done. Appellant was interrogated instead. He could have been taken before an arraigning officer on Saturday, nor was this done. Again he was interrogated. He was not taken before an arraigning officer until the following Monday and even the Monday appearance may not actually have been an arraignment as far as the writer can determine. Appellant's testimony was that the appearance was an argument

over extradition. If such appearance was an arraignment why did the government again arraign appellant when he was returned to Anchorage, Alaska? It is not customary to twice arraign a person charged with a crime. In fact it would appear to the writer to be extremely unusual and only done for a reason. The reason for the second arraignment has never been explained. Appellee would have the Court believe that appellant could not have been arraigned before the following Monday because it would not have been during normal business hours in Seattle.

On page 10 of its brief appellee states that even if the case of *Nardone v. United States,* 308 U.S. 338, is extended beyond its factual context that nevertheless the influence of the first confession obtained from appellant was so diminished after legal advice and two arraignments as to have no causal connection whatever with the admissions objected to.

The conclusion of appellee is not supported by the facts. It is undisputed that from the moment of appellant's arrest Friday afternoon, March 15, 1957, until the time he was finally released on reduced bail in Anchorage, Alaska, on April 4, 1957, he was constantly either in jail, being questioned by officers, in the custody of Special Agent Harkabus traveling to Alaska, in jail in Anchorage or out of jail in Anchorage and in the custody of Special Agent Harkabus, Officers Pass and Trafton traveling around the Anchorage area being questioned on the confession during which time reiterations were obtained. The influence of Officer Harkabus was never relaxed prior

to appellant's being released on bail and securing counsel for the first time.

Appellee quotes Judge Holtzoff in *U. S. v. Heideman,* 21 FRD 335, 336, on page 13 of its brief. Judge Holtzoff analyzes the holding in the *Mallory* case strictly on the facts (page 338) as being a holding that 7½ hours is too long an interval and constitutes an unreasonable delay in bringing a prisoner before a committing magistrate. Judge Holtzoff goes on to hold in his case that 1¼ hours after arrest is not an unreasonable delay in bringing the accused before a committing magistrate. It would appear from such reasoning that Judge Holtzoff himself would have had no difficulty at all in holding in the case before this Court that a delay of approximately 65 hours in bringing the accused before a committing magistrate was certainly excessive. This is assuming that the Monday morning hearing actually constituted an arraignment.

II.

On page 15 of its brief appellee requests that appellant state some authority for the contention that the trial Court should have allowed a private hearing to determine whether later admissions reiterating the contents of the excluded confession, made by appellant in the presence of Officer Dankworth, should be admitted as voluntarily made.

Appellant cites the case of *McNabb v. United States,* 318 U.S. 332, 346, where the Court says that if, in the course of a criminal trial in the Federal

Courts, it appears that evidence has been obtained in violation of legal rights, it is the duty of the trial Court to entertain a motion for the exclusion of such evidence and to hold a hearing to determine whether the motion should be granted or denied. The Court goes on to point out that the interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the question.

When counsel for appellant objected to the introduction of the written confession and requested a private hearing to determine the question of its voluntariness the Court very properly held such a private hearing and decided that the confession was not admissible.

The undisputed facts in this case are that, after the confession had been obtained and after the appellant had been removed to Alaska and while still in the almost constant custody of Special Agent Harkabus and Officers Pass and Trafton during any period he was away from the federal jail in Anchorage, he is supposed to have voluntarily made certain admissions which reiterated the contents of the excluded confession. It is undisputed that at the time the admissions were supposed to have been made appellant was in the custody of Special Agent Harkabus, Detective Pass and Officers Trafton and Laird as well as Officer Dankworth and in an office of the Territorial Police in Anchorage, Alaska. The Government's witness stated that the admissions made by appellant were voluntary. The question that counsel for appellant

wanted decided before the case proceeded any further was whether the admissions actually were voluntary. In order to determine this question the jury should have been excluded from the courtroom and counsel for appellant should have been permitted to examine Officer Dankworth as to the complete circumstances surrounding the so-called admissions just as was done in the same trial in the case of Special Agent Harkabus and the excluded confession. While the jury was still excluded counsel for appellant could have placed appellant Smith on the witness stand to testify further in connection with the voluntary nature of the so-called admissions. Such a hearing was not permitted. In fact, was specifically denied. After denial of the motion all opportunity for counsel for appellant to show to the Court as a matter of law that the admissions were not voluntarily made was lost.

It is submitted that the principle outlined in *McNabb v. United States* and the principle actually followed in this case during its trial with respect to Special Agent Harkabus' testimony and the voluntary nature of the confession, control should have been followed.

Appellee states at the bottom of page 15 of its brief that:

> "The trial Judge allowed a hearing on the appellant's motion to strike Mr. Dankworth's testimony".

What appellee means is that the judge allowed argument on appellant's written motion to strike. No

hearing was ever conducted to determine the voluntary nature of appellant's alleged admissions.

III.

On page 16 of its brief appellee cites the case of *Morton v. United States,* 147 F. (2d) 28, 31, in support of its contention that the trial Court did not err in refusing to instruct that the admissions of appellant must have been voluntarily made.

In the *Morton* case appellant was questioned by officers and made certain admissions which were later repeated by an officer on the witness stand. It appears also from this decision that a confession given under the same circumstances as the admissions would have been admissible. It is also undisputed that appellant was immediately taken before a committing magistrate.

If, as appellee contends, the voluntariness of the admissions is a question of law for the Court, then appellant's argument that a hearing should have been conducted by the Court before Dankworth was permitted to testify, is reinforced.

Exception was taken by appellant to the Court's failure to instruct the jury on this question. (2nd Supp. Tr. 334.)

IV.

Covered in preceding argument.

V.

Appellant has no comment concerning appellee's argument on this point commencing on page 17 of its brief.

The original remarks of the U. S. Attorney in closing argument were borderline even in their most favorable light. With each following exchange the U. S. Attorney and the judge aggravated the situation into reversible error.

VI.

On page 23 of its brief appellee cites the case of *Shores v. United States,* 174 F. (2d) 838, 843 (8th Cir. 1949), in support of its contention that the trial Court did not err in refusing to permit appellant to inspect his confession prior to trial.

This identical case was cited by appellant in his brief as an example of how a Court could reason around the plain language of a rule using the Notes of the Advisory Committee. On page 843 the Court stated:

> "In a general sense, of course, a confession may be regarded as a paper or document 'obtained' from the defendant. But reading the language of the rule in the light of the history involved in its formulation and in its context, we do not believe such was its intended legal connotation and the purpose here. The notes of the Advisory Committee undertook to point out that it was doubtful whether discovery was permissible in criminal

cases under existing law, and then added, as to the intended scope of the formulated rule, the following: 'The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. . . .' "

Rule 16 of the Federal Rules of Criminal Procedure is not ambiguous. It plainly states that upon motion of a defendant the Court "may order" to permit inspection, copying or photographing designated books, papers, documents or tangible objects obtained from or belonging to the defendant "upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."

True, it does not say the Court *"shall order."* Neither does it say the defense *"shall"* prove that the item is material to preparation of the defense. The request must be "reasonable"—a matter for the trial Court's discretion.

It is submitted that the "intent" of the Advisory Committee at the time the rule was submitted in unambiguous draft form is no longer important. Once the Supreme Court has adopted and promulgated the rule the intent of the Supreme Court should be the criterion in applying the rule to the facts of a given case. Certainly, the intent of the Advisory Committee should not be used to create ambiguity where none exists.

In the *Shores* decision the Court admits that in a general sense, a confession may be regarded as a

paper or document obtained from the defendant. The Court then goes on to decide that the rule can not possibly mean what it says but was meant by the Advisory Committee to be merely a restatement of existing practice in some Courts of permitting limited discovery.

It would seem that the intent of the rule is to grant a defendant discovery as to the items mentioned unless the request appears unreasonable or the items are not necessary to the preparation of the defense. If the request for discovery is denied it should be based on at least one of the two grounds specifically mentioned as a limitation on the right. In this case neither ground was urged as a reason for denial, nor did the Court make any finding that either objection or limitation existed.

See Barron, Federal Practice and Procedure, Vol. 4, Sec. 2031, pages 124-125.

Dated, Anchorage, Alaska,
January 28, 1959.

Respectfully submitted,
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Attorney for Appellant.